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No. 74-538

In the Supreme Court of the United States

OCTOBER TERM, 1974

UNITED STATES OF AMERICA, PETITIONER

v.

HENRY OGLE WATSON

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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The Solicitor General, on behalf of the United States, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINION BELOW

The opinion of the court of appeals (App. A, *infra*) is not yet reported.

JURISDICTION

The court filed an opinion (App. D, *infra*) on December 12, 1973. The government filed a timely petition for rehearing with a suggestion for rehearing *en banc*, whereupon the court withdrew its original opinion. A new opinion (App. A, *infra*) was issued on March 20, 1974, and the judgment of the court of appeals was entered the same day (App. B, *infra*). The

government again filed a timely petition for rehearing with a suggestion for rehearing *en banc*. It was denied on September 5, 1974 (App. C, *infra*). By order of October 2, 1974, Mr. Justice Douglas extended the time for filing a petition for a writ of certiorari to and including November 4, 1974. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether an arrest warrant is required in order to make an arrest in a public place.

2. Whether a person unlawfully in custody is capable of giving a voluntary consent to a search of his automobile.

CONSTITUTIONAL PROVISION INVOLVED

The Fourth Amendment to the United States Constitution provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

STATEMENT

On August 17, 1972, Awad Khoury, an informant who had provided reliable information on at least five prior occasions (Tr. 10–14, 27–28),[1] telephoned Postal Inspector Frank L. Barbarick. Khoury related that he was going to receive from respondent a stolen Bank of America credit card in the name of Syed T. Ahmad. Later that day Khoury brought Barbarick the credit card he had described. The inspector ascertained from the Bank of America that the credit card had been mailed on August 14, 1972, but had not been received by the intended customer. Khoury told Barbarick that respondent gave him the card with instructions to purchase airline tickets in specified names and addresses, and he showed Barbarick a list of the names and addresses. When Khoury said that he could obtain more credit cards from respondent, Barbarick instructed him to meet with respondent to obtain them (Tr. 14–17). A meeting was arranged, but it was postponed several times.

[1] "Tr." refers to the transcript of the trial proceedings.

Barbarick instructed Khoury to find out at the meeting whether respondent had additional credit cards. If he did, Khoury was to light a cigarette as a signal to surveilling agents. The meeting finally took place at noon on August 23, 1972, in a public restaurant (Tr. 19, 21). After learning that respondent had stolen credit cards in his car, Khoury gave the prearranged signal (Tr. 246). Postal inspectors entered the restaurant, arrested respondent, and searched him. They did not, however, find any stolen credit cards.[2] They escorted him out of the crowded restaurant and gave him *Miranda* warnings. Respondent stated: "Frank [Barbarick], I understand my rights"[3] (Tr. 22–23, 162).

[2] Khoury did not tell the inspectors at the scene that the cards were in respondent's car.

[3] Respondent and Barbarick knew each other. Respondent had been arrested by Barbarick in 1971 for mail theft and subse-

Barbarick asked respondent whether he could look in respondent's car. Respondent replied, "Go ahead." Before beginning the search Barbarick warned: "You know, if I find anything, it is going to go against you." Nevertheless respondent reaffirmed his consent, stating: "Go ahead, there is nothing in there" (Tr. 23–24). Using keys furnished by respondent, the postal inspectors searched the car. Under the floormat they found two stolen credit cards, which, together with the card provided by Khoury, formed the basis of the criminal charges against respondent (Tr. 24–25).

Respondent moved to suppress the stolen credit cards. The district court denied his motion from the bench (Tr. 60–61), and respondent was subsequently convicted of possessing the two stolen credit cards found in his automobile. He was acquitted on a third count charging him with possessing the stolen card provided by informant Khoury.

A divided panel of the court of appeals reversed. The court ruled that the information gathered on August 17, including the physical receipt of a stolen credit card, provided probable cause to arrest respondent. The majority believed that Inspector Barbarick should have obtained a warrant on August 17 for respondent's arrest, and because it could find "no reason for the failure to present the question to a detached magistrate to obtain an arrest warrant" (App. A, *infra,* p. 5A), it concluded that the warrantless arrest on August 23 was unconstitutional. Proceeding on the conclusion that respondent was under unconstitutional arrest, the majority found that the consent to search the car was defective. Rather than hold that the consent was a "fruit" of an unconstitutional act, the court found that the consent was involuntary because respondent "was in custody in violation of the Fourth Amendment" (App. A, *infra,* p. 7A). Therefore, although respondent had been given *Miranda* warnings, had been told that any evidence found in the car would be used against him, and was on a first-name basis with the arresting inspector, and no circumstances suggesting coercion were present, the court ordered the credit cards found in the consent search suppressed.

The dissenting judge concluded that officers are not required to procure an arrest warrant as soon as they acquire probable cause, but may instead continue their investigation. Here, he found, their suspicions were reinforced by Khoury's signal at the restaurant, and the ensuing arrest was lawful (App. A, *infra,* pp. 7A–8A).

quently had acted as his informant (Tr. 69, 169–170). The charge was dismissed after respondent furnished postal authorities with important information (Tr. 49–50).

REASONS FOR GRANTING THE WRIT

This case presents two important and related questions concerning the procedure law enforcement agents should follow when making a felony arrest on probable cause. The first question deals with the necessity of obtaining a warrant even though the arrest is made in a public place where the officers would have every right to be without a warrant. The second is

whether one under unlawful arrest may nevertheless give an effective consent to search.

If the Court holds, as we believe precedent and logic compel, that there is no need to secure a warrant to make such an arrest, then the predicate for the court of appeals' decision to suppress the evidence disappears, and it would be unnecessary to reach the second question. Conversely, the Court might assume that the arrest was unconstitutional and decide, as we believe would be required in the circumstances here presented, that the consent was nevertheless effective. Both issues are sufficiently important to the administration of the criminal justice system that they should be decided by this Court.

1. It has been until now the unquestioned rule that an arrest for a felony may be made with probable cause but without a warrant. The court of appeals, relying upon what it believed were implications in the plurality opinion in *Coolidge* v. *New Hampshire*, 403 U.S. 443, 476–481, has abruptly set aside that understanding. If the decision of the court of appeals is permitted to stand, it will be necessary for law enforcement agents substantially to change the procedures they use in investigating crime and arresting suspects. This Court should reverse the court of appeals and reaffirm the rule that has been under a cloud since *Coolidge*.

a. The rule that a warrant is unnecessary to make an arrest for a felony on probable cause is an ancient one with its roots in the common law of England, where arrests *with* warrants were viewed with intense

suspicion.[4] As this Court stated the principle in *Carroll* v. *United States*, 267 U.S. 132, 156–157:

> [A] police officer may arrest without warrant one believed by the officer upon reasonable cause to have been guilty of a felony, and * * * he may only arrest without a warrant one guilty of a misdemeanor if committed in his presence.

Since *Carroll*, this Court has many times reaffirmed the rule, often in the context of state or federal statutes granting to officers the power to arrest without a warrant. See, *e.g.*, *Henry* v. *United States*, 361 U.S. 98, 100.[5] The decision below disregards these precedents. If the court of appeals is correct, not only standard law enforcement procedure but also numerous federal statutes permitting arrest without a warrant would be called into question.[6]

The court of appeals believed its result to be supported by the plurality opinion in *Coolidge* v. *New Hampshire*, *supra*. The arrest in *Coolidge* took place in a private home that ordinarily could not be entered

[4] Coke, *Fourth Institute of the Laws of England* 177 (1797 ed.). See generally Wilgus, *Arrest Without a Warrant*, 22 Mich. L. Rev. 541 (1924); Barrett, *Personal Rights, Property Rights, and the Fourth Amendment*, 1960 Sup. Ct. Rev. 46.

[5] 18 U.S.C. 3052 provides for warrantless arrests when an offense is committed in an officer's presence or when an officer has "reasonable grounds to believe that the person to be arrested has committed or is committing" a felony. The Court found in *Henry* that this section "states the constitutional standard." 361 U.S. at 100.

[6] The following federal statutes, all upheld by decisions of one or more courts of appeals, permit federal agents to arrest without a warrant under certain circumstances: 18 U.S.C. 3052 (F.B.I.); 18 U.S.C. 3056 (Secret Service); 21 U.S.C. 878 (Bureau of Narcotics and Dangerous Drugs; by substitution, Drug Enforcement Agency); 26 U.S.C. 7607 (Customs Service).

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without a warrant. The arrest was then used as justification for a search of the entire premises. In the instant case, however, the arrest took place in a restaurant where the officers, even without a warrant or probable cause to arrest, were entitled to be. There was no exhaustive search using the pretext of an arrest;[7] respondent's person was searched, and his consent was obtained before searching his car. The *Coolidge* plurality carefully restricted its discussion to the propriety of warrantless entry into a house for the purpose of making an arrest. 403 U.S. at 476, 477, 480.

Although *Coolidge* therefore does not support the result reached below, its discussion of the law of arrest has injected an element of uncertainty into what was before a settled point of law. Litigation in the lower federal courts over the propriety of an arrest without a warrant has been increasing since *Coolidge* was decided. The decision below, which is the first of which we are aware that requires a warrant for an arrest in a public place,[8] conflicts with several recent court of appeals decisions holding that *Coolidge* did not create such a requirement. See *United States* v. *Miles*, 468 F. 2d 482, 486 (C.A. 3); *United States* v. *Bazinet*, 462 F. 2d 982 (C.A. 8); *Dorman* v. *United States*, 435

[7] The arrest of respondent could not have been a pretext to avoid the need for a search warrant. Until informant Khoury gave the signal in the restaurant the inspectors had no probable cause to believe respondent was in the immediate possession of stolen credit cards, and they therefore could not have obtained a warrant to search his person or his automobile.

[8] *Niro* v. *United States*, 388 F. 2d 535 (C.A. 1), arguably supports the result reached below.

F. 2d 385, 389–391 (C.A.D.C.) (*en banc*); *United States* v. *Morris*, 477 F. 2d 657 (C.A. 5). This conflict among the circuits should be resolved by this Court.

b. The decision below will seriously hamper effective law enforcement without providing significant protection to the individual's interests. It exposes officials to the dilemma rejected—in the Sixth Amendment context—in *Hoffa* v. *United States*, 385 U.S. 293, 310. Police will be required to ascertain at their peril the exact moment that the courts will later hold that they acquired probable cause to arrest, and thereupon to secure a warrant without delay. If they fail to recognize that they had probable cause, they risk suppression of their later discoveries. If, on the other hand, officers obtain the warrant required by the decision below but delay execution in order to gather the evidence necessary to convict, they may be criticized for deliberately postponing execution for the purpose of "prejudicing" the defendant, a practice some courts have forbidden. See, *e.g.*, *Godfrey* v. *United States*, 358 F. 2d 850 (C.A.D.C.). They risk a violation of the Fourth Amendment if they act too soon, and a violation of the Fourth Amendment if they wait too long.

Moreover, as *Hoffa* recognized, to require a warrant as soon as probable cause has been detected may force the officers to cut off an investigation before they have secured sufficient evidence to convict—a situation forcefully illustrated here by the acquittal of respondent on the count charging him with possession of the credit card that the informant, Khoury, gave to inspector Barbarick and that furnished the

initial probable cause. And to the extent the officers delay execution while gathering additional evidence, they continue to intrude on the suspect's privacy, so that the warrant will have provided him no shield.

The ironic result of the reasoning of the majority below is that police may be best off should the magistrate decline to issue a warrant when first approached. The officers then would be free to continue their investigation. As in the instant case, they could arrange for the gathering of additional evidence and arrest (without a warrant) on the basis of the new evidence plus exigent circumstances. For example, it could have been argued that the arrest of respondent was based on such exigent circumstances; had he left the restaurant without being arrested, he might have secreted the stolen credit cards or disposed of them.[9]

In short, the decision below on the arrest issue is contrary to existing precedent and revolutionary in its implications. It will not provide additional protection to individual interests, but it will hamper the enforcement of the laws and discourage the very kind of police work—such as that engaged in here by postal authorities—that sound Fourth Amendment policy should encourage.

2. If it is assumed or concluded that respondent was improperly arrested, it is then necessary to determine

[9] Of course, exigent circumstances at the moment of arrest would not be a satisfactory answer to the court of appeals' theory (if that theory is correct) that the inspectors should have sought a warrant six days previously, and that it would have been obtained if sought. Cf. *Vale* v. *Louisiana*, 399 U.S. 30.

whether that precluded an effective consent to the search of his car. Although the court of appeals purported to consider the "totality" of the circumstances, we submit that it did not do so and instead elevated the legal status of the arrest into a single and determinative factor.

The essential facts were undisputed. Immediately after his arrest, respondent was given *Miranda* warnings;[10] he knew that he was under no obligation to converse further with the arresting officers. Respondent was not a neophyte at these procedures; he had been arrested before and had served as an informant for Inspector Barbarick, with whom he was on a first name basis (Tr. 23, 69). Respondent was familiar with his constitutional rights, including the right not to speak, and at one point after his arrest even suggested to Inspector Barbarick that he not bother to explain these rights again (Tr. 23). Finally, respondent was informed, after he gave his initial consent to the search, that if anything were found it would be used against him; he then reaffirmed his consent with the remark that there was nothing in the car (Tr. 23–24). We submit that this record contains overwhelming evidence that respondent fully understood his rights and voluntarily agreed to the search of his car. The only pertinent reason suggested by the court

[10] Another panel of the Ninth Circuit has joined several other courts in holding that evidence that a person was given *Miranda* warnings is also strong evidence that his consent was voluntary. *United States* v. *Heimforth*, 493 F. 2d 970.

of appeals for drawing a contrary conclusion is that respondent was under unconstitutional arrest.[11]

By directing its investigation to the conduct of the arresting officers, the court was injecting irrelevant factors into the voluntariness analysis of *Schneckloth* v. *Bustamonte*, 412 U.S. 219, 227, which focuses on the knowledge and intent of the person giving that consent and the totality of circumstances affecting his decision. Instead of undertaking this essentially subjective inquiry, however, the majority here considered as determinative the legality of the earlier conduct of the officers.

The illegality of the arrest depended upon what the officers had failed to do six days previously; none of the conduct constituting the failure to obtain a warrant took place in respondent's presence, and he cannot have known about it. He did not know that Khoury had informed on him six days previously. He did not know that no warrant had been obtained. Neither he nor the officers knew that the court of appeals would suddenly reverse many years of precedent and require a warrant for his arrest. Because

[11] The court of appeals also noted that respondent had not explicitly been advised of his right to refuse his consent. However, this advice is fairly implicit in the *Miranda* warnings and in Inspector Barbarick's warning after respondent's initial consent. In any event, *Schneckloth* v. *Bustamonte*, 412 U.S. 219, has held that lack of such knowledge is not determinative; the court of appeals here found not lack of knowledge but lack of express advice and therefore failed to make a finding that would be pertinent under *Schneckloth*. To the extent the court was relying on failure to warn (rather than failure to know), it was considering an extraneous factor for the reasons stated *infra*.

none of these things entered respondent's consciousness, they cannot have affected his decision to consent to a search of his car.

We believe that the correct approach—that the only proper focus of inquiry in a consent search case is on what the consenter knows—is implicit in *Schneckloth*. The court below has simply considered irrelevant material;[12] the way in which it did so, however, is seductive.[13] Consideration of such extraneous material by the court below and by other circuits will seriously deform the *Schneckloth* test and discourage law enforcement agents from relying on consents, even though procurement of voluntary consent is a technique less intrusive than others, including warrants, to which officials would be forced to turn were consents made less attractive and less reliable once obtained.[14]

[12] Irrelevant as part of any voluntariness formula. The illegality of the arrest might be pertinent under a "fruit of the poisonous tree" argument of the sort raised in *Brown* v. *Illinois*, No. 73–6650, certiorari granted October 21, 1974, but the court below did not use this analysis, nor do we believe that it would change the outcome.

[13] And contagious. See *Manning* v. *Jarnigan*, 501 F. 2d 408 (C.A. 6). See our petition for a writ of certiorari in *United States* v. *Cooks*, No. 74–333, presenting a related consent search issue.

[14] This case is in several respects a counterpart of *Brown* v. *Illinois*, No. 73–6650, certiorari granted October 21, 1974. *Brown* presents a situation in which an arrest is presumed illegal, and what follows the arrest is a confession rather than a consent. If this Court decides in *Brown* that the statement is admissible, then the consent in the instant case should be effective. On the other hand, if the statement in *Brown* must be suppressed, it will become even more urgent to consider our contentions here that a

CONCLUSION

For the foregoing reasons it is respectfully submitted that the petition for a writ of certiorari should be granted.

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NOVEMBER 1974.

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warrantless arrest is proper, and that effective consent to search, which involves considerations materially different from those regarding confessions, may be given even by those under unconstitutional arrest.

APPENDIX A

United States Court of Appeals for the Ninth Circuit

No. 73–1539

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

v.

HENRY OGLE WATSON, DEFENDANT-APPELLANT

[March 20, 1974]

Appeal from the United States District Court for the Central District of California

Before ELY and GOODWIN, Circuit Judges, and MURRAY,* District Judge

MURRAY, *District Judge*: An indictment was filed against the appellant on September 11, 1972, alleging a four count violation of 18 U.S.C. § 1708 (stealing from the mails). Count 1 alleged a violation on August 23, 1972; Count 2 alleged a violation on August 17, 1972; Count 3 alleged a violation on August 23, 1972; and Count 4 alleged a violation on May 28, 1971. The appellant was ultimately tried on Counts 1, 2 and 3. Count 4 was dismissed. The jury returned a verdict of guilty as to Counts 1 and 3, and not guilty as to Count 2.

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*The Honorable W. D. Murray, United States District Judge for the District of Montana, sitting by designation.

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On the day of the trial, the district court heard motions to suppress evidence pursuant to Rule 41(e) Federal Rules of Criminal Procedure and a motion to determine the voluntariness of any post-arrest statements pursuant to *Jackson* v. *Denno,* 378 U.S. 368 (1964). In response to these motions, the government called Frank L. Barbarick, a U.S. Postal Inspector, as a witness. Inspector Barbarick testified that he was contacted on the telephone by one Awad Khoury on August 17, 1972. He knew Khoury as Tony and had previous contacts with him from five to ten times. In the course of these prior contacts, Khoury related information concerning appellant Watson and his associates. This information was found to be reliable by Inspector Barbarick.

In the August 17, 1972, phone call, Khoury advised the Inspector that he, Khoury, was going to receive a Bank of America credit card from appellant Watson. The card was in the name of Syed T. Ahmad. Barbarick told Khoury to bring the credit card to Barbarick's office when he received it from Watson. Later on that day, Khoury brought the credit card into Barbarick's office. Khoury said that he had received this card from appellant and that appellant wanted him to purchase TWA airline tickets. Khoury also showed Inspector Barbarick a slip of paper that gave names and addresses for the airline tickets to be purchased. Inspector Barbarick told Khoury to arrange a meeting with appellant Watson. Khoury advised Barbarick that a meeting was scheduled for August 22, 1972, but this meeting did not take place. A meeting with Watson on August 23 similarly did not take place. Finally, a meeting between Khoury and Watson was set up for noon on the 23rd of August at Ship's Restaurant in Los Angeles. Barbarick testified that he told Khoury to determine at the

meeting whether Watson had any additional credit cards in his possession. If Watson did have some additional cards, Khoury was to light a cigarette as a signal to Postal Inspectors inside the restaurant. These inspectors would then activate a signal alerting Inspector Barbarick outside the restaurant. Upon receiving the prearranged signal Barbarick and other inspectors entered the restaurant and placed the defendant under arrest, advising him that he was under arrest for possession of stolen mail. Inspector Barbarick then asked Watson if he could look in his car. Watson said "Go ahead." Using the key to the car which Watson had turned over, Barbarick opened the car and searched. Under the floormat on the driver's side he recovered an envelope. Inspector Barbarick's later testimony indicated that the envelope which he discovered was not opened until he returned to his office in downtown Los Angeles. At that time he found that two smaller envelopes were contained inside the larger envelope and that it was these two envelopes which contained the credit cards which are the source of the allegations in Counts 1 and 2 [sic]. In making the arrest the inspector testified he was relying on the evidence acquired on August 17, 1972, which was six days prior to arrest.

In his initial argument, appellant raises the strictly technical point that a stipulation [1] which his attorney

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[1] The stipulation read as follows: "That on or about August 14th of 1972, BankAmericard Corporation sent through the mails three credit cards in separate envelopes, with separate addresses on them. That these three separate and distinct credit cards and envelopes were addressed to, number one, a Marlene M. Steinberg, at 12407 Ohio Avenue in Los Angeles. And that her credit card number was 4024 681 187 691. In addition, another credit card on or about August 14, was sent by BankAmericard to one Syed T. Ahmad. And that was sent to 1502

and the United States Attorney intended to introduce was never affirmatively or competently entered into or accepted by the court and that, consequently there is an absence of proof.

The record reveals that both parties, the court and the jury all were under the impression that the stipulation had been entered in the record. The agreement to stipulate was communicated to the court prior to the empanelling of the jury. The stipulation was read to the jury in the government's opening statement. The defense counsel referred to the stipulation during his cross-examination. The appellant himself made reference to the stipulation. Since all parties concerned were under the impression that the stipulation had been entered in the record, the defendant-appellant cannot be allowed to benefit from a purely technical error, if in fact there was error.

Appellant next contends that (A) the hearing on the motion to suppress failed to establish that the informant's reliability was sufficient to warrant use of his "tip": (B) he contends that the failure to obtain an arrest warrant vitiates the arrest and subsequent seizure; and (C) he contends that a consent to search cannot be acquired during an illegal detention and that his consent was not shown to be voluntary and knowledgeable.

As to appellant's first contention, the Judge at the suppression hearing found that the informant's reliability had been established by the testimony of In-

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Wellesley Avenue, in West Los Angeles. His credit card number was 4024 682 059 676. Another credit card was sent by BankAmericard through the mails to one Kenneth Sorensen of 12118 Ohio Avenue, in West Los Angeles. His credit card number was 4024 688 038 351." It was further stipulated that the individuals to whom these credit cards were addressed never received the credit card in question.

spector Barbarick and that the reliability standards of *Aguilar,* 378 U.S. 108, and *Spinelli,* 393 U.S. 410, had been met. Inspector Barbarick testified that he had been contacted by Informant Khoury prior to August 17, 1972, on five to ten occasions and that Khoury had related information concerning appellant Watson and his associates and that the information supplied helped in knowing the whereabouts of people that were involved in mail theft throughout the Los Angeles area. There is sufficient evidence to support the trial judge's finding that Khoury was "reliable". Consequently, on August 17, 1972, when Khoury gave Barbarick the credit card which he said he had received from Watson, probable cause existed to arrest appellant Watson for mail theft.

Appellant's second contention has merit, i.e. the failure to obtain an arrest warrant vitiates the arrest. As stated above, Inspector Barbarick had probable cause to arrest appellant on the 17th of August, 1972. However, the arrest was not made until six days later—on the 23rd of August. There appears to be no reason for the failure to present the question to a detached magistrate to obtain an arrest warrant.

"The case of Warden v. Hayden, [387 U.S. 294] where the Court elaborated a 'hot pursuit' justification for the police entry into the defendant's house without a warrant for his arrest, certainly stands by negative implication for the proposition that an arrest warrant is required in the absence of exigent circumstances." *Coolidge* v. *New Hampshire,* 403 U.S. 480. "The warrant requirement is not an inconvenience to be somehow 'weighed' against the claims of police efficiency. It is, or should be, an important working part of our machinery of government, operating as a matter of course to check the well-intentioned but mistakenly over-zealous executive officers who are a part

of any system of law enforcement." *Coolidge, supra* at 481. The government in this case has shown no "exigent" circumstances which would justify not obtaining an arrest warrant during the six day interim period between the 17th of August and the day of the actual arrest. The arrest of the appellant was in violation of the 4th Amendment to the U.S. Constitution.

Thirdly, appellant attacks the voluntariness of his consent to search. At the time appellant consented to the search, he was under arrest. Nothing in the record indicates that he knew of or was advised of his right not to consent to the search of his automobile.

At the time of the consent to the search of this car, the law of the Ninth Circuit required a showing that the defendant knew he could withhold his consent and a showing as to whether any consent was coerced or uncoerced. *Schoepflin* v. *United States*, 391 F. 2d 390 (9th Cir. 1968). However, in *Schneckloth* v. *Bustamonte*, 412 U.S. 219 (1973), the Supreme Court, reversing an earlier decision by this court, 448 F. 2d 699 (9th Cir. 1971), held that:

> "* * * Voluntariness is a question of fact to be determined from all of the circumstances, and while the subject's knowledge of a right to refuse is a factor to be taken into account, the prosecution is not required to demonstrate such knowledge as a prerequisite to establishing a voluntary consent. * * *"

Recently, in *United States* v. *Rothman*, 492 F. 2d 1260 (9th Cir., Nov. 27, 1973), this court, conceding that *Schneckloth* is limited by its facts to cases in which the consenting party is not in custody, observed that we have never applied a different test for consent searches on the basis of the pre-consent arrest of the consenting party and held that "arrest is but one

factor, albeit a critical one, in determining whether or not the consent was voluntary." 492 F. 2d at 1264, n. 1. Hence, the Supreme Court's "totality of circumstances" test applies to all consent search situations, whether or not the consenting party is under arrest.

Here, we find that the totality of circumstances strongly suggests coercion. Appellant had been placed under arrest and was in custody at the time that he gave the officers permission to search his car.

> "* * * In looking at the factual issue of voluntariness, the court must be aware of the 'vulnerable subjective state' of the defendant as well as the possibility of 'subtly coercive police questions.' *Schneckloth* v. *Bustamonte*, supra, 412 U.S. at 229, and the inherently coercive nature of custodial interrogation, *Id.* at 247." *United States* v. *Rothman*, 492 F. 2d at 1265.

Not only was appellant Watson in custody, he was in custody in violation of the Fourth Amendment, since the agents had failed to obtain an arrest warrant. Moreover, in *Rothman*, where we held that the defendant had not properly consented to a search, the defendant admitted that he knew that he had a right to refuse. Here, nothing indicates that Watson knew or was advised of his right not to consent to the search of his automobile. Hence, in light of *Schneckloth* and *Rothman*, we hold that the in-custody search of the appellant was invalid, and the fruits of the search should have been suppressed.

In light of the above it is not necessary to discuss other issues raised.

REVERSED.

GOODWIN, *Circuit Judge*, dissenting: I would affirm. I agree that the agents could have obtained an arrest warrant as early as six days before they arrested Watson, but it by no means follows that the arrest

without a warrant was not lawful. I know of no case which holds that officers must make an arrest the moment they come into possession of enough evidence to cause a magistrate to issue a warrant. *United States* v. *Leon,* 460 F. 2d 299, 300 (9th Cir. 1972). There are many times when good law enforcement commends further investigation. At the time of Watson's arrest, a pre-arranged signal gave the officers new knowledge that Watson was then in possession of additional stolen credit cards. This information alone would have justified a warrantless arrest at the time it was made.

Given a lawful arrest, the only basis Watson urged in the trial court for his motion to suppress the evidence collapses. I do not join in the majority's discussion of *Schneckloth* v. *Bustamonte,* 412 U.S. 219 (1973), as it is not responsive to any issue raised below or in the briefs and arguments on appeal.

APPENDIX B

JUDGMENT

United States Court of Appeals For the Ninth Circuit

No. 73-1539 (D.C. No. 11056)ALS

UNITED STATES OF AMERICA, DEFENDANT/APPELLEE

v.

HENRY OGLE WATSON, DEFENDANT/APPELLANT

[March 20, 1974]

Appeal from the United States District Court for the Central District of California.

This cause came on to be heard on the Transcript of the Record from the United States District Court for the Central District of California and was duly submitted.

On consideration whereof, It is now here ordered and adjudged by this Court, that the judgment of the said District Court in this Cause be, and hereby is reversed.

A true copy, attest:
October 24, 1974.

EMIL E. MELFI, Jr., *Clerk.*
By MARY TURLEY, *Deputy.*

APPENDIX C

United States Court of Appeals for the Ninth Circuit

No. 73–1539

UNITED STATES OF AMERICA, APPELLEE

v.

HENRY OGLE WATSON, APPELLANT

[September 5, 1974]

Before ELY and GOODWIN, Circuit Judges, and MURRAY, District Judge*

The panel as constituted in the above case has voted to deny the petition for rehearing and to reject the suggestion for a rehearing en banc.

The full court has been advised of the suggestion for an en banc hearing, and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35(b).

The petition for rehearing is denied and the suggestion for a rehearing en banc is rejected.

*The Honorable William D. Murray, Senior United States District Judge for the District of Montana, sitting by designation.

APPENDIX D

United States Court of Appeals for the Ninth Circuit

No. 73–1539

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

v.

HENRY OGLE WATSON, DEFENDANT-APPELLANT

[December 12, 1973]

Appeal from the United States District Court for the Central District of California

Before ELY and GOODWIN, Circuit Judges, and MURRAY,* District Judge

MURRAY, *District Judge:* An indictment was filed against the appellant on September 11, 1972, alleging a four count violation of 18 U.S.C. § 1708 (stealing from the mails). Count 1 alleged a violation on August 23, 1972; Count 2 alleged a violation on August 17, 1972; Count 3 alleged a violation on August 23, 1972; and Count 4 alleged a violation on May 28, 1971. The appellant was ultimately tried on Counts 1, 2 and 3. Count 4 was dismissed. The jury returned a verdict of guilty as to Counts 1 and 3, and not guilty as to Count 2.

On the day of the trial, the district court heard motions to suppress evidence pursuant to Rule 41(e) Federal Rules of Criminal Procedure and a motion to determine the voluntariness of any post-arrest state-

*The Honorable W. D. Murray, United States District Judge for the District of Montana, sitting by designation.

ments pursuant to *Jackson* v. *Denno,* 378 U.S. 368 (1964). In response to these motions, the government called Frank L. Barbarick, a U.S. Postal Inspector, as a witness. Inspector Barbarick testified that he was contacted on the telephone by one Awad Khoury on August 17, 1972. He knew Khoury as Tony and had previous contacts with him from five to ten times. In the course of these prior contacts, Khoury related information concerning appellant Watson and his associates. This information was found to be reliable by Inspector Barbarick.

In the August 17, 1972, phone call, Khoury advised the Inspector that he, Khoury, was going to receive a Bank of America credit card from appellant Watson. The card was in the name of Syed T. Ahmad. Barbarick told Khoury to bring the credit card to Barbarick's office when he received it from Watson. Later on that day, Khoury brought the credit card into Barbarick's office. Khoury said that he had received this card from appellant and that appellant wanted him to purchase TWA airline tickets. Khoury also showed Inspector Barbarick a slip of paper that gave names and addresses for the airline tickets to be purchased. Inspector Barbarick told Khoury to arrange a meeting with appellant Watson. Khoury advised Barbarick that a meeting was scheduled for August 22, 1972, but this meeting did not take place. A meeting with Watson on August 23 similarly did not take place. Finally, a meeting between Khoury and Watson was set up for noon on the 23rd of August at Ship's Restaurant in Los Angeles. Barbarick testified that he told Khoury to determine at the meeting whether Watson had any additional credit cards in his possession. If Watson did have some additional cards, Khoury was to light a cigarette as a signal to Postal Inspectors inside the restaurant. These inspectors would then activate a signal alerting Inspector Barbarick outside the restaurant. Upon receiving the prearranged signal Barbarick and other inspectors entered the restaurant and placed the defendant under arrest, advising him that he was under arrest for possession of stolen mail. Inspector Barbarick then asked Watson if he could look in his car. Watson said "Go ahead." Using the key to the car which Watson had turned over, Barbarick opened the car and searched. Under the floormat on the driver's side he recovered an envelope. Inspector Barbarick's later testimony indicated that the envelope which he discovered was not opened until he returned to his office in downtown Los Angeles. At that time he found that two smaller envelopes were contained inside the larger envelope and that it was these two envelopes which contained the credit cards which are the source of the allegations in Counts 1 and 2. In making the arrest the inspector testified he was relying on the evidence acquired on August 17, 1972, which was six days prior to arrest.

In his initial argument, appellant raises the strictly technical point that a stipulation [1] which his attorney and the U.S. Attorney intended to introduce was never

[1] The stipulation read as follows: "That on or about August 14th of 1972, BankAmericard Corporation sent through the mails three credit cards in separate envelopes, with separate addresses on them. That these three separate and distinct credit cards and envelopes were addressed to, number one, a Marlene M. Steinberg, at 12407 Ohio Avenue in Los Angeles. And that her credit card number was 4024 681 187 691. In addition, another credit card on or about August 14, was sent by BankAmericard to one Syed T. Ahmed. And that was sent to 1502 Wellesley Avenue, in West Los Angeles. His credit card number was 4024 682 059 676. Another credit card was sent by BankAmericard through the mails to one Kenneth Sorensen of 12118 Ohio Avenue, in West Los Angeles. His credit card number was 4024 688 038 351." It was further stipulated that the individuals to whom these credit cards were addressed never received the credit card in question.

affirmatively or competently entered into or accepted by the court and that, consequently there is an absence of proof.

The record reveals that both parties, the court and the jury all were under the impression that the stipulation had been entered in the record. The agreement to stipulate was communicated to the court prior to the empanelling of the jury. The stipulation was read to the jury in the government's opening statement. The defense counsel referred to the stipulation during his cross-examination. The appellant himself made reference to the stipulation. Since all parties concerned were under the impression that the stipulation had been entered in the record, the defendant-appellant cannot be allowed to benefit from a purely technical error, if in fact there was error.

Appellant next contends that (A) the hearing on the motion to suppress failed to establish that the informant's reliability was sufficient to warrant use of his "tip"; (B) he contends that the failure to obtain an arrest warrant vitiates the arrest and subsequent seizure; and (C) he contends that a consent to search cannot be acquired during an illegal detention and that his consent was now [sic] shown to be voluntary and knowledgeable.

As to appellant's first contention, the Judge at the suppression hearing found that the informant's reliability had been established by the testimony of Inspector Barbarick and that the reliability standards of *Aguilar,* 378 U.S. 108, and *Spinelli,* 393 U.S. 410, had been met. Inspector Barbarick testified that he had been contacted by informant Khoury prior to August 17, 1972, on five to ten occasions and that Khoury had related information concerning appellant Watson and his associates and that the information supplied helped in knowing the whereabouts of people that were involved in mail theft throughout the Los

Angeles area. There is sufficient evidence to support the trial judge's finding that Khoury was "reliable". Consequently, on August 17, 1972, when Khoury gave Barbarick the credit card which he said he had received from Watson, probable cause existed to arrest appellant Watson for mail theft.

Appellant's second contention has merit, i.e. the failure to obtain an arrest warrant vitiates the arrest. As stated above, Inspector Barbarick had probable cause to arrest appellant on the 17th day of August, 1972. However, the arrest was not made until six days later—on the 23rd of August. There appears to be no reason for the failure to present the question to a detached magistrate to obtain an arrest warrant.

"The case of Warden v. Hayden, [387 U.S. 294] where the Court elaborated a 'hot pursuit' justification for the police entry into the defendant's house without a warrant for his arrest, certainly stands by negative implication for the proposition that an arrest warrant is required in the absence of exigent circumstances." *Coolidge* v. *New Hampshire,* 403 U.S. 480. "The warrant requirement is not an inconvenience to be somehow 'weighed' against the claims of police efficiency. It is, or should be, an important working part of our machinery of government, operating as a matter of course to check the well-intentioned but mistakenly over-zealous executive officers who are a part of any system of law enforcement." *Coolidge, supra* at 481. The government in this case has shown no "exigent" circumstances which would justify not obtaining an arrest warrant during the six day interim period between the 17th of August and the day of the actual arrest. The arrest of the appellant was in violation of the 4th Amendment to the U.S. Constitution.

Thirdly, appellant attacks the voluntariness of the consent to search. At the time appellant consented to the search, he was under arrest. Nothing in the record

indicates that he knew of or was advised of his right not to consent to the search of his automobile. At the time of the consent of the search of this car, the law of the Ninth Circuit required a showing that the defendant knew he could withhold his consent and a showing as to whether any consent was coerced or uncoerced. *Schoepflin* v. *U.S.*, 391 F. 2d 390 (1968). The record in the Schoepflin case was similar to the record in the case at hand in that "there is not a word of testimony in the record to indicate that Smith was aware of the fact that he could refuse to permit the requested search of his apartment." *Schoepflin, supra* at 399. The Supreme Court has since partially overruled this Ninth Circuit requirement. In the decision of *Schneckloth* v. *Bustamonte,* 41 U.S.L.W. 4726 (1973), the court held that "when the subject of a search is *not in custody* and the state attempts to justify a search on the basis of his consent" there is no necessity of showing that the defendant knew or was advised of his right not to submit to the search. The Ninth Circuit requirement of a showing of knowledge of the right to refuse has been overruled only in the context of out-of-custody searches. The court in *Schneckloth* reiterates the Miranda holding that custodial interrogations by the police are inherently coercive and consequently, detailed warnings are required. Not only was appellant Watson in custody, he was in custody in violation of the 4th Amendment since the agents had failed to obtain an arrest warrant. The totality of the circumstances certainly suggests coercion. In light of the Ninth Circuit law at the time of the consent, *Schoepflin,* and the *Schneckloth* case, the in-custody search without appropriate warnings must be declared invalid. The fruits of the search should have been suppressed.

The case at hand is distinguishable from *U.S.* v. *Iron and Lyon* (9th Cir. #72-2595 and 2596) decided

by this court on July 26, 1973. In the *Iron* decision, the consent to search was made prior to any arrest. It was an out-of-custody consent and thus, under *Schneckloth,* the prosecution was not required to demonstrate knowledge of a right to refuse.

In the *Iron* decision, *U.S.* v. *Page,* 302 F. 2d 81, 84 (9th Cir. 1962) was cited for the proposition that appellate courts usually sustain a trial court's finding that there was consent to a search, even though the consent was obtained under authority of the badge, and the government must show that there was no coercion in fact. It should be noted, however, that in *Page* we went on to say, "The government's burden is greater where consent is claimed to have been given while the defendant is under arrest." *Page* at 84. We hold that in an in-custody situation, the prosecution must show that a defendant either knew of, or was advised of his right to refuse to consent to a search.

In view of the above it is not necessary to discuss other issues raised.

REVERSED.

GOODWIN, *Circuit Judge,* dissenting: I would affirm. I agree that the agents could have obtained an arrest warrant as early as six days before they arrested Watson, but it by no means follows that the arrest without a warrant was not lawful. I know of no case which holds that officers must make an arrest the moment they come into possession of enough evidence to cause a magistrate to issue a warrant. There are many times when good law enforcement commends further investigation. At the time of Watson's arrest, a prearranged signal gave the officers new knowledge that Watson was then in possession of additional stolen credit cards. This information alone would have justified a warrantless arrest at the time it was made.

Given a lawful arrest, Watson's only basis for his motion to suppress the evidence collapses.

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